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No. 84-1702

In the Supreme Court of the United States

OCTOBER TERM, 1984

H.F. ALLEN ORCHARDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the Bureau of Reclamation breached a contractual duty to issue an accurate prediction of the total expected water supply in the Yakima Basin for the 1977 growing season.

1. Petitioners are farmers in the State of Washington who are members of various Yakima Project irrigation districts. The Yakima Project is a water project constructed by the federal government pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 *et seq.*, to provide participating irrigation districts with water from the Yakima River. The Bureau of Reclamation contracts with the irrigation districts to deliver water from the Yakima Project and charges a fee to cover the Project's construction, operation and maintenance costs. The fee generally is passed on to the members of the districts—ultimate water users such as petitioners. Pet. App. A2, A10-A11.

The allocation of water from the Yakima Project among the irrigation districts is governed by a consent decree entered in *Kittitas Reclamation District* v. *Sunnyside Valley Irrigation District*, Civ. No. 21 (E.D. Wash. Jan. 31, 1945). (The decree is reprinted at Pet. App. A77-A106.) The consent decree defines the total water supply available (TWSA) as (*id.* at A103-A104):

> that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

The TWSA is allocated first to irrigation districts with senior, nonproratable rights and then to districts with junior, proratable rights (*id.* at A2-A3, A103-A105). Petitioners are members of districts with proratable rights (*id.* at A2-A3, A12).

In 1977 a water shortage occurred in the Yakima area due to drought and low snow pack (Pet. App. A12). The irrigation districts were concerned about their water supply and, partially in response to their requests, the Bureau of Reclamation in February 1977 issued a preliminary estimate of the amount of water that would be available for the growing season. The Bureau projected that irrigation districts with nonproratable rights would receive all of their allotment, but districts with proratable rights would receive 6%-7% of their allotment. *Id.* at A13. Farmers with proratable water rights, such as petitioners, reacted to this estimate by planting less water-intensive crops, allowing lands to lie fallow, and selling off livestock prematurely (*id.* at A3). In succeeding months the Bureau increased its projection due to

greater than expected precipitation and the inclusion in the projections of estimates of irrigation runoff. Irrigation districts with proratable rights eventually received 70% of their normal supply of water (*id.* at A13), but petitioners assert that they incurred heavy losses as a result of their initial water conservation efforts.

2. Petitioners filed suit in the Claims Court against the United States claiming that the 1945 consent decree and the irrigation districts' contracts with the Bureau obligated the Bureau to make accurate estimates of water availability. They asserted that the Bureau breached this obligation in February 1977 by negligently predicting the available water supply.

The Claims Court granted summary judgment in favor of the government (Pet. App. A9-A30). The court found that neither the 1945 consent decree nor the irrigation contracts between petitioners and the Bureau "expressly obligated [the Bureau] or the United States to furnish to [petitioners] any advance estimate or forecast of the total water supply available for irrigation purposes during the entire growing season" (*id.* at A15). The court also concluded that petitioners "failed to supply any factual predicate from which it [could] be concluded that the Bureau impliedly obligated itself to make such advance estimates or forecasts" (*id.* at A17). In addition, the court determined that petitioners had "no enforceable rights against the United States" (*id.* at A19) because they were neither parties to nor third-party beneficiaries of the irrigation contracts (*id.* at A19-A30).

The court of appeals affirmed (Pet. App. A1-A8). The court found that petitioners were third-party beneficiaries of the contracts and the consent decree and therefore could maintain the action for breach of contract (*id.* at A8). However, the court of appeals agreed with the Claims Court that the Bureau was under "no contractual obligation to

accurately estimate the [available water supply]" (*id.* at A4), and held that the Claims Court properly granted judgment for the government.

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court of petitioners' fact-bound contract claim is not warranted.

a. Petitioners' principal contention is that the 1945 consent decree and the irrigation contracts between the Bureau of Reclamation and the irrigation districts "expressly and impliedly" obligate the Bureau to furnish petitioners with a "timely and competent computation" of the total water supply available for distribution to the irrigation districts (Pet. 3). This claim is totally without merit; both courts below correctly found that the Bureau was under "no contractual duty to project the [available water supply] correctly, or at all, or warranty that any projection made will be correct." Pet. App. A4; see also *id.* at A15-A18. The courts below concluded that no express provision of the consent decree or the contracts imposes such a duty (*id.* at A4-A5, A15-A16), and petitioner has not cited any such provision in this Court (see Pet. 14-15). In addition, as the court of appeals observed, "there is nothing in the circumstances surrounding the entrance of the decree or in any custom or usage to suggest that the decree was formalizing any prior act or obligation of the government to forecast the [available water supply]. * * * [W]e find that at the time [the decree was entered] the parties did not intend to obligate the Bureau to forecast accurately the [available water supply]. Such an obligation cannot now be added by this court" (Pet. App. A6).[1]

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[1]Petitioners rely (Pet. 15) upon *Owyhee Ditch Co.* v. *United States*, 126 F. Supp. 429 (D. Ore. 1954), but that case concerned a breach of an express contractual obligation to deliver water. Petitioners have not cited a similar express provision imposing an obligation to predict the available water supply.

The courts below also correctly concluded that no implied contract required the government to furnish water supply forecasts. Petitioners have failed to show any facts establishing the prerequisites for such an implied contract —(1) the parties' intention to enter into an agreement, and (2) action by an officer with authority to bind the government. Pet. App. A6-A7, A16-A18; see also *City of Alexandria* v. *United States*, 737 F.2d 1022, 1027 (Fed. Cir. 1984); *Narva Harris Construction Corp.* v. *United States*, 574 F.2d 508, 511 (Ct. Cl. 1978). Petitioners claim (Pet. 15-17) that their water rights under the contracts and the consent decree are "illusory" if the government is not required to supply a prediction of the amount of water that will be available. However, farmers typically must make their own assessments concerning rainfall and other sources of water that will be available for a forthcoming growing season; nothing in the contracts or consent decree indicates that the government agreed to perform this task for petitioners.[2]

b. Petitioners also assert (Pet. 8-10) that the government breached a fiduciary duty to petitioners by issuing an erroneous forecast of the available water supply. However, none of the authorities cited by petitioners even refers to any obligation to predict future water availability. Petitioners' assertions of the existence of a general "fiduciary duty"

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[2]Petitioners' assertions (Pet. 18) regarding the government's "concessions" of the legal issues in this case are unfounded. For example, petitioners support their contention that the government has conceded that the Bureau had a contractual duty by reciting the fact that the Bureau made calculations of water availability. But the government's decision voluntarily to provide this service surely does not by itself impose upon the government a contractual obligation.

Petitioners' contentions (Pet. 13-14) regarding the government's alleged negligence are irrelevent. As the court of appeals observed, the "negligent performance of a noncontractual duty cannot be the basis of a breach of contract claim" (Pet. App. A7).

simply provide no basis for imposing upon the United States the obligation to issue water supply forecasts.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JULY 1985

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[3]Moreover, the court of appeals correctly noted (Pet. App. A4, A7-A8) that a claim based upon an extra-contractual duty would not be cognizable under the Tucker Act, 28 U.S.C. 1491.